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No. 01-1104

IN THE

Supreme Court of the United States

RANDALL W. HANSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE BUSINESS ROUNDTABLE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the "responsible corporate officer" doctrine, which this Court has applied only to statutes lacking a *mens rea* requirement, also applies to "knowing endangerment" under the Resource Conservation and Recovery Act and to other serious environmental crimes for which Congress has enacted a heightened *mens rea* requirement.

II. Whether the felony provisions of the Resource Conservation and Recovery Act and the Clean Water Act are public welfare statutes permitting convictions of individual defendants without proof of *mens rea*.

III. Whether a conviction for "corporate conspiracy" can be sustained on the basis of a lower *mens rea* requirement than that of the underlying offense.

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading national organizations that collectively represent the interests of a broad spectrum of United States industries. Each of the *amici* advocates public policies that promote vigorous and environmentally responsible economic growth.

The Business Roundtable is an association of chief executive officers of major United States corporations. The Roundtable seeks to advance policies that foster a healthy economy, for the benefit of corporations and consumers alike.

The National Association of Manufacturers (NAM) is the largest United States industrial trade association, comprising 14,000 members and 350 member associations from every industrial sector. NAM supports legislation and public policies that create a dynamic, competitive business climate for United States manufacturers.

The American Petroleum Institute (API) is the foremost United States trade association for the oil and natural gas industry. API represents over 400 member companies engaged in all aspects of that industry, and serves as a major force for advocating the public policy objectives and interests of the oil and natural gas sector.

As advocates of responsible economic and industrial growth, *amici* strongly support compliance with federal and state environmental regulation. *Amici* are concerned, however, that the decision in *United States* v. *Hansen*, 262 F.3d 1217 (11th Cir. 2001) (per curiam), impermissibly expands criminal liability for corporate officers far beyond

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court. No counsel for any party has authored this brief in whole or in part. No monetary contributions to the preparation or submission of this brief have been made by any person or entity other than *amici curiae* and their counsel. Sup. Ct. R. 37.6.

what Congress specified in enacting the felony provisions of federal environmental laws. The result below actually undermines respect for the law by eroding the link between criminal and moral culpability.[2]

INTRODUCTION

This case involves a corporate CEO, Randall Hansen,[3] whose primary responsibility at LCP Chemicals-Georgia ("LCP") was to address the company's debilitating financial problems and to guide the company through the bankruptcy process. *Id.* at 1229. As CEO, Hansen had overall responsibility for managing the corporation—including environmental affairs—but he apparently did not personally order or direct any environmental violations. Moreover, because the company was in bankruptcy, he evidently did not have a free hand to make environmental or other major decisions. Significantly, the bankruptcy court actually denied the company's request for certain environmental compliance funds. See *id.* at 1237. But notwithstanding Hansen's relatively limited responsibility for, and involvement with, environmental matters—involvement the sentencing judge characterized as "after the fact" and possibly "unintentional"[4]—he was convicted and sentenced to a lengthy period of incarceration under the "knowing

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[2] The mental state associated with moral culpability is variously referred to herein as *mens rea* (or "guilty mind"), scienter, or criminal "intent."

[3] *Amici* focus principally on petitioner Randall Hansen because, as chief executive officer, the role of the "responsible corporate officer" jury instruction in diminishing the applicable *mens rea* standard is starkest in his case. The legal arguments, however, also apply to separate petitioners Christian A. Hansen and Alfred R. Taylor. *See Hansen* v. *United States*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1112). *Amici's* legal arguments concern only the lower courts' failure to implement the relevant statutory requirements, and do not imply any broader position regarding the defendants' actions.

[4] R14-235-6, -8.

endangerment" provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(e).[5] His conviction was flawed because it was based on jury instructions that effectively vitiated the statutory *mens rea* requirement and replaced it with vicarious liability under the "responsible corporate officer" doctrine. This hyper-extension of the Court's public welfare offense precedents of *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and *United States* v. *Park*, 421 U.S. 658 (1975), is seriously misguided and dangerous. It may discourage corporate officer involvement in regulatory matters,[6] and it circumvents the express will of Congress to require heightened, not relaxed, standards of personal culpability to establish guilt for serious environmental crimes.

If this Court corrects the error, and instructs the lower courts to give effect to statutory *mens rea* requirements, it would not absolve corporate officers of responsibility for their intentional wrongdoing—it would simply uphold the standards for criminal intent that Congress expressly provided for certain environmental crimes.

REASONS FOR GRANTING THE PETITION

The courts below effectively eliminated the personal culpability requirements expressly set forth in law. Instead of adhering to the statutory requirements, the lower courts allowed corporate officers to be convicted if they "had a

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[5] Hansen was also convicted of "knowing" violations of both RCRA, 42 U.S.C. § 6928(d)(2)(A), and the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(2)(A). The impropriety of vicarious criminal liability is clearest with regard to the "knowing endangerment" provision of RCRA, but equally applicable to other felony provisions of RCRA and the CWA that specify a "knowing" state of mind. Proof of *mens rea* is required by any statute that criminalizes "knowing" violations.

[6] *Cf. United States* v. *Weitzenhoff*, 35 F.3d 1275, 1295 (9th Cir. 1994) (Kleinfeld, J., dissenting) (this use of the doctrine deters work in regulated fields), *cert. denied*, 513 U.S. 1128 (1995).

responsible relationship to the violation," "had the power or capacity to prevent the violation," and "acted knowingly in failing to prevent, detect or correct the violation." App. 95a. Pursuant to this jury instruction, guilt was a function of status, not intentional wrongdoing. Even the limited "knowledge" component of the *Hansen* jury instruction related only to whether Hansen knowingly failed to "prevent, detect or correct" the violation, rather than whether he "knowingly transport[ed], treat[ed], store[d], dispose[d] of, or export[ed] any hazardous waste . . . *know[ing] at that time* that he thereby place[d] another person in imminent danger of death or serious bodily injury," as the statute requires. 42 U.S.C. § 6928(e) (emphasis added). Congress could not have devised statutory language more demanding and unequivocal; it is simply not possible to reconcile this statute's intrinsically personal standard of liability with the "status" crime permitted by the trial court.

The "responsible corporate officer" doctrine, in contrast, arose in the context of public welfare statutes that contain no *mens rea* requirement and impose light penalties. In *Staples* v. *United States*, 511 U.S. 600, 618 (1994), this Court strongly suggested that the public welfare offense doctrine does not apply to felonies, but ultimately left this question open. Nonetheless, the district court in *Hansen* did not observe this Court's admonition in *Staples*, *id.*, against diminished intent standards for felonies, and permitted Hansen to be convicted of felony crimes based on what the court described as "after the fact" knowledge of LCP's environmental problems, R14-235-6, and regardless of whether Hansen's conduct was "intentional or unintentional," R14-235-8. The court of appeals upheld the convictions as though the relevant statutory provisions did not contain heightened *mens rea* requirements.

Hansen presents an opportunity to take up the question left open in *Staples*, and to revive the fundamental moral culpability requirement for serious, felony crimes.

I. *HANSEN* RELIES ON VICARIOUS CRIMINAL LIABILITY REJECTED BY CONGRESS.

Hansen demonstrates the acute need for providing guidance to the lower courts in applying the "responsible corporate officer" doctrine where Congress has established intent and knowledge as specific elements of a felony. The doctrine was developed by this Court for regulatory offenses where Congress had not specified *mens rea* elements and where the statute imposed only misdemeanor penalties. See *Park*, 421 U.S. at 671-74 (construing the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 331(k)); *Dotterweich*, 320 U.S. at 285 (same).

As a device used to increase the reach of liability for corporate crimes, the doctrine allows "responsible corporate officers" to be personally convicted if they bear a "responsible relation" to the business activity in question. *Dotterweich*, 320 U.S. at 285. Liability derives from the individual's status as a corporate officer; personal fault and actual knowledge are not required for a conviction. See *id.* at 281. Any corporate officer who "shares responsibility in the business process" that resulted in illegal conduct may be held vicariously liable for the corporation's acts. *Id.* at 284.

This Court has not yet addressed whether the "responsible corporate officer" doctrine applies to environmental crimes that require actual knowledge and carry felony penalties. The circuit courts are split on this issue, with some courts—including the 11th Circuit—effectively permitting vicarious, or derivative, liability under this doctrine, even where *mens rea* is an element of the statute at issue.

A. The Felony Statutes At Issue Here Unmistakably Require *Mens Rea*.

Both the text and the legislative history of RCRA demonstrate that Congress specified a heightened *mens rea* requirement for the "knowing endangerment" provision of that Act. RCRA explicitly states that conduct only amounts

to "knowing endangerment" if a "person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste . . . *knows at that time* that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. § 6928(e) (emphasis added). Accordingly, to be convicted, the defendant must have personal knowledge of, and personal involvement with, the specific disposition of the hazardous waste at issue, and also have actual knowledge[7] of the extreme danger posed to others by such disposition *at the time the defendant "transports, treats . . . [or] disposes of" the hazardous waste. Id.* (emphasis added). It is clear on the statute's face that one who learns of dangerous conduct only after it has occurred does not possess the requisite *mens rea*.

Moreover, vicarious liability and imputed knowledge are plainly foreclosed by the statute. *Id.* § 6928(f). A defendant "is responsible only for actual awareness or actual belief that he possessed" and "knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant." *Id.* § 6928(f)(2)(A), (B). Congress thus codified the rule that a criminal defendant's knowledge must be personal; one may not be convicted based solely on one's corporate position or responsibilities. Knowledge possessed only by others in the corporation is similarly insufficient. Contrary to the district court's jury instructions, a defendant who merely discovers or fails to discover prior misconduct could not have the *mens rea* for "knowing endangerment." *See id.*

The legislative history of RCRA's "knowing endangerment" provision further reflects Congress' intent to create a clear and careful distinction between those individuals who possess personal, prior knowledge of danger, and those who do not. In rejecting a "reckless endangerment"

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[7] Indeed, the statute expressly requires that the defendant be "substantially certain" that his conduct will place others in imminent danger. 42 U.S.C. § 6928(f)(1)(C).

provision in favor of the "knowing endangerment" provision, Congress explained that "[t]he knowledge necessary for culpability of a natural person is *actual knowledge*, which may be established by direct or circumstantial evidence, but not constructive or vicarious knowledge." H.R. Conf. Rep. No. 96-1444, at 37 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5028, 5037 (emphasis added). A defendant lacks the necessary *mens rea* "if he did not actually have the requisite knowledge about the danger at the time he acted." *Id.* at 39, *reprinted in* 1980 U.S.C.C.A.N. at 5038.

The *Hansen* jury instruction violated each of these precepts. By charging the jury to convict based on failure to "prevent, detect or correct," App. 95a, and by acknowledging that Hansen's knowledge was "after the fact," R14-235-6, and his conduct possibly "unintentional," R14-235-8, the district court flatly disregarded the specific, textual requirements of the law.

This failure to comply with the detailed, demanding statutory requirements for proving "knowing endangerment" was echoed by the Eleventh Circuit. The court of appeals purported to recognize the need for both personal knowledge of the illegal activities and awareness of the danger posed at the time the activities occur. But the court did not devote any meaningful analysis to whether the jury had been properly instructed. The court merely stated, perfunctorily, that the jury instructions passed muster because they included the phrase "'acted knowingly.'" *Hansen*, 262 F.3d at 1253. The "knowledge" required by the district court to prove guilt differed markedly, however, from the "knowledge" required by the statute.

By instructing the jury that Hansen could be convicted of "knowing endangerment" based on his "responsible relationship to the violation," App. 95a, rather than his actual, personal knowledge and intent, the courts below allowed convictions based on the vicarious criminal liability rejected

by Congress.[8] This Court's review is necessary to steer the lower courts back toward the plain language of the statute.

B. *Hansen* Significantly Extends The "Responsible Corporate Officer" Doctrine.

This Court has declined previous opportunities to define the parameters of personal criminal liability for environmental violations. See *United States* v. *Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States* v. *Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).[9] These decisions, however, presented less extreme examples of the trend toward diminished *scienter* for environmental crimes. In prior cases, the conduct in question was more egregious, the penalties were lighter, or the relevant statutory language was less rigorous.

In *Hanousek*, the supervisor of a rock-quarrying project was convicted of a misdemeanor for negligently discharging oil into a river, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(1)(A), 1321(b)(3). The provisions at issue penalized negligent conduct, and did not include a heightened *mens rea* requirement. See 176 F.3d at 1121 ("If Congress intended to prescribe a heightened negligence standard, it could have done so explicitly."). Given these statutory provisions, the court found that the CWA constitutes public

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[8] Judge Kleinfeld criticized such judicial expansions of criminal liability in dissenting from the denial of rehearing en banc in *United States* v. *Weitzenhoff*. He said: "It is we, and not Congress, who have made [the defendants] felons. The statute, read in an ordinary way, does not." 35 F.3d at 1293 (discussing the "knowing" violation provision of the CWA, 33 U.S.C. § 1319(c)(2)(A), which was the basis for one of Hansen's convictions).

[9] This Court also recently denied certiorari in *United States* v. *Ming Hong*, 242 F.3d 528 (4th Cir.), *cert. denied*, 122 S. Ct. 60 (2001). As in *Hanousek*, Ming Hong was convicted of a misdemeanor for negligent violations of the CWA, 33 U.S.C. § 1319(c)(1)(A). 242 F.3d at 530. Moreover, illegal discharges "occurred openly while Hong was present." *Id.* at 532.

welfare legislation, and therefore allows criminal penalties without proof of *mens rea*. *Id.* at 1122. Two Justices dissented from the denial of certiorari in *Hanousek*. See *Hanousek* v. *United States*, 528 U.S. 1102 (2000). Justices Thomas and O'Connor rejected the characterization of the CWA as a public welfare statute, citing the severity of the potential penalties. *Id.* at 1103-04. *Hansen* is a significantly more compelling candidate for this Court's review because the crime at issue is a felony, the statute explicitly calls for heightened standards of personal knowledge, and the penalties imposed are considerably more severe. Compare 42 U.S.C. § 6928(d)(2), and *id.* § 6928(e), with 33 U.S.C. § 1319(c)(1)(A), and *id.* § 1321(b)(3) (express knowledge and intent requirements versus simple negligence). While Hanousek was convicted of only a misdemeanor and received a six-month prison sentence, see 176 F.3d at 1120, Hansen was convicted of a felony and sentenced to four years in prison, see 262 F.3d at 1232.

Hansen likewise represents a far greater expansion of vicarious liability than did the decision in *Weitzenhoff*. There, the Ninth Circuit affirmed the convictions of two sewage treatment plant managers who had personally ordered illegal discharges of sludge in violation of the CWA, 33 U.S.C. § 1319(c)(2). See 35 F.3d at 1282 (the defendants "instructed two employees at the plant to dispose of [sludge] on a regular basis by pumping it from the storage tanks . . . directly into the ocean"). Even in *Weitzenhoff*, where the defendants had deliberately engaged in "midnight dumping," five judges dissented from the denial of rehearing en banc, decrying the majority's erosion of *mens rea* for environmental crimes. *Id.* at 1293-99 (Kleinfeld, J., dissenting). Yet *Hansen* lowers the thresholds for criminal liability still further. Absent any personal conduct even approaching the "midnight dumping" in *Weitzenhoff*, the Eleventh Circuit affirmed Hansen's conviction without demanding proof of the statutory element of personal knowledge at the time of the actions in question

that others were thereby placed in "imminent danger." 42 U.S.C. § 6928(e).[10]

II. THE PUBLIC WELFARE OFFENSE DOCTRINE DOES NOT APPLY TO STATUTES THAT REQUIRE *MENS REA* AND IMPOSE FELONY PENALTIES.

The courts of appeals are split on the issue of whether the criminal provisions of environmental legislation are public welfare statutes that permit convictions without proof of *mens rea*. See *Hanousek*, 528 U.S. at 1103 (Thomas, J., dissenting from the denial of cert.) (noting the circuit split regarding whether the CWA is a public welfare statute); *United States* v. *Kelley Technical Coatings, Inc.*, 157 F.3d 432, 439 n.4 (6th Cir. 1998) (deeming the public welfare doctrine applicable to the CWA); *United States* v. *Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (rejecting the argument that the CWA is a public welfare statute); *Weitzenhoff*, 35 F.3d at 1286 (characterizing the CWA as public welfare legislation); *United States* v. *MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991) (reversing a RCRA conviction where a "responsible corporate officer" instruction dispensed with

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[10] As in *Weitzenhoff*, but unlike the present case, defendants convicted in previous environmental crime cases have been personally involved in directing or specifically authorizing the violations to a significant degree. *See, e.g.*, *United States* v. *Kelly*, 167 F.3d 1176, 1178 (7th Cir. 1999) (defendant directed the movement of hazardous materials to an unapproved disposal site); *United States* v. *Eidson*, 108 F.3d 1336, 1340 (11th Cir. 1997) (defendant gave permission for disposal in the sewer); *United States* v. *Laughlin*, 10 F.3d 961, 963 (2d Cir. 1993) (defendant personally released creosote sludge onto the ground); *United States* v. *Self*, 2 F.3d 1071, 1087 (10th Cir. 1993) (defendant directed the illegal storage of hazardous waste, then concealed the waste from inspectors); *United States* v. *Sellers*, 926 F.2d 410, 412 (5th Cir. 1991) (defendant personally dumped paint waste onto a creek embankment); *United States* v. *Hoflin*, 880 F.2d 1033, 1035 (9th Cir. 1989) (defendant instructed an employee to remove and bury paint drums); *United States* v. *Greer*, 850 F.2d 1447, 1450-52 (11th Cir. 1988) (defendant himself ordered the illegal dumping).

proof of actual knowledge). Accordingly, this Court's review would provide essential guidance regarding the legal standards applicable to environmental felonies and public welfare offenses.[11]

A. This Court Has Only Applied The "Responsible Corporate Officer" And Public Welfare Doctrines To Statutes Without *Mens Rea* Requirements.

The "responsible relationship" concept was developed in the context of public welfare statutes that impose strict liability for violations. See *Morissette* v. *United States*, 342 U.S. 246, 259-60 (1952). Public welfare statutes have been defined as laws that "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare." *Id.* at 254. Such laws punish "forbidden acts or omissions" rather than a particular mental state. *Id.* at 252-53. The "responsible corporate officer" doctrine thus originated in cases involving regulatory statutes that do not contain a knowledge requirement and that prescribe relatively small, misdemeanor penalties for violations. In *Dotterweich*, 320 U.S. at 278, the president of a pharmaceutical company whose employees had shipped misbranded and adulterated drugs was convicted of violating the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 331. The provision did not specify any *mens rea*. See *id.* Violators were guilty of a misdemeanor. See *id.* § 333. In upholding the conviction, the Court looked to the statute and noted that:

> Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise

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[11] Though the Eleventh Circuit did not explicitly refer to the public welfare doctrine, the court implicitly relied upon it by invoking the "responsible corporate officer" principle. *Hansen*, 262 F.3d at 1250-51.

> innocent but standing in responsible relation to a public danger.

320 U.S. at 281.

In *Park*, 421 U.S. at 673-74, this Court reviewed the same provision of the FDCA and explained that misdemeanor liability was proper even for a corporate officer who had no direct involvement in the criminal offense, provided he had a "responsible relationship" to the illegal actions. Further developing the doctrine, the Court held that those with supervisory responsibility were liable for failures to prevent or correct violations. *Id.* The statute at issue in both *Dotterweich* and *Park* prescribed misdemeanor penalties, contained no *mens rea* requirement, and imposed essentially strict liability for violations. Several lower courts, including the Eleventh Circuit in *Hansen*, have ignored these distinguishing attributes and reflexively applied the "responsible corporate officer" concept and the public welfare offense doctrine to statutes that require heightened *mens rea*. See, *e.g.*, *United States* v. *Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986); *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984); see also Karen M. Hansen, *"Knowing" Environmental Crimes*, 16 Wm. Mitchell L. Rev. 987, 1006 (1990) (hereinafter *"Knowing" Environmental Crimes*) (facile application of the public welfare offense doctrine "is misguided because it juxtaposes 'knowing' crimes with an analytical model that has little, if any, applicability where a statute defines an offense in terms of a culpability requirement").

This Court's precedents indicate that the public welfare offense doctrine cannot be employed to eliminate *mens rea* requirements. In *Morissette*, 342 U.S. at 250, the Court explained that public welfare offenses are the exception to the cardinal principle that "an injury can amount to a crime only when inflicted by intention." The Court distinguished public welfare offenses, which "d[o] not specify intent as a necessary element," *id.* at 256, from the common law crime at

issue in that case, which did demand proof of intent, *id.* at 261. Where *mens rea* is required, "presumptive intent has no place." *Id.* at 275. The *Morissette* Court accordingly reversed the defendant's conviction where the trial court had instructed the jury that intent could be presumed from the defendant's act. *Id.* It follows from *Morissette* that courts may not prejudge the *mens rea* element of an offense based solely on the defendant's "responsible relationship" to an activity. The jury instruction in *Hansen*, however, impermissibly allowed the jury to infer that a "responsible relationship," rather than specific knowledge, was a sufficient basis for finding guilt.

Even where a statute is part of a regulatory scheme that operates for the public benefit, all of its provisions cannot automatically be classified as public welfare offenses for which intent need not be proven. In *Liparota* v. *United States*, this Court reviewed a conviction obtained under a statute, 7 U.S.C. § 2024(b)(1), that criminalized "knowingly" using or transferring food stamps in an unauthorized manner. 471 U.S. 419, 420 (1985). The government had argued that the food stamp program was public welfare legislation, and thus that no proof of actual knowledge was necessary. *Id.* at 432. This Court rejected that argument and held that because the statute had specified a mental state, proof of knowledge was required. *Id.* at 425-26. The public welfare offense doctrine does not apply where, as with "knowing endangerment" under RCRA, Congress has required actual knowledge and *mens rea*.

B. Felony Penalties Are Not Characteristic Of Public Welfare Offenses.

In addition to containing a *mens rea* element, the "knowing endangerment" provision of RCRA, and the "knowing" violation provisions of RCRA and the CWA, prescribe severe, felony penalties for violations. See 42 U.S.C. § 6928(d), (e); 33 U.S.C. § 1319(c)(2). By contrast, relatively light penalties have been a key attribute of public welfare offenses in this

Court's jurisprudence. According to *Morissette*, a defining characteristic of such offenses is that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." 342 U.S. at 256.

In *Staples*, 511 U.S. at 618, this Court expressly reserved the question of whether felony crimes can be characterized as public welfare offenses. The statute there, which penalized possession of an unregistered automatic weapon as a felony, was silent as to *mens rea*. *Id.* at 605. The Court nonetheless concluded that deeming the provision a public welfare statute and dispensing with *mens rea* could "'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610 (quoting *Liparota*, 471 U.S. at 426). Without deciding the issue, the Court noted that the statute's harsh penalty strongly supported the conclusion that the public welfare offense doctrine did not apply in that case. The fact that "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*," *id.* at 616, suggests "that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense," *id.* at 618; see also *Hanousek*, 528 U.S. at 1104 (Thomas, J., dissenting from the denial of cert.) (examining the CWA's felony provision and determining that "[t]he seriousness of these penalties counsels against concluding that the CWA can accurately be classified as a public welfare statute"). Consequently, even absent an explicit knowledge requirement, the Court refused to construe the statute so as to eliminate *mens rea*. Surely where, as with the statutes at issue in *Hansen*, Congress has not only prescribed felony penalties but also expressly set forth an intent requirement, the public welfare offense doctrine cannot be invoked to impose liability without proof of *mens rea*.[12]

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[12] As this Court made clear in *Staples*, the fact that certain articles contain potentially dangerous properties does not alone justify invoking the public welfare offense doctrine to dispense with *mens rea* for all legislation that regulates those articles. 511 U.S. at 611; *see also*

See M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 Loy. L.A. L. Rev. 105, 108 (1992) ("Congress has reshaped criminal environmental violations so that they no longer conform to the traditionally gentle description of public welfare offenses.").

C. Eliminating *Mens Rea* For Felonies Risks Over-Criminalizing Regulatory Offenses And Undermining The Integrity Of The Criminal Law.

Strong policy considerations support this Court's prior decisions to restrict the application of the public welfare offense doctrine to avoid converting "intent" crimes into strict liability offenses.[13] Expanding the public welfare offense doctrine to statutes such as the CWA would too readily expose those engaging in "a broad range of ordinary industrial and commercial activities" to "heightened criminal liability." *Hanousek*, 528 U.S. at 1103 (Thomas, J., dissenting from the denial of cert.).[14] Failing to give effect to

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Hanousek, 528 U.S. at 1104 (Thomas, J., dissenting from the denial of cert.) ("[W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities.").

[13] *See* Lawrence Friedman & H. Hamilton Hackney III, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 Vill. Envtl. L.J. 1, 4 (1999) (To ignore statutory intent requirements "would indeed create a special category of 'green collar' criminals, transforming environmental statutes . . . into a virtual strict liability scheme. Under such a scheme the government would, in essence, have to make only the most minimal showing with respect to intent.").

[14] The five Ninth Circuit judges who dissented from the denial of rehearing en banc in *Weitzenhoff*, 35 F.3d at 1293, also cautioned against unduly deterring individuals from engaging in the wide spectrum of "ordinary, innocent, productive activity" that is regulated by environmental statutes.

statutory intent requirements subjects those in vitally important industries to "a massive legal risk, unjustified by law or precedent." *Weitzenhoff*, 35 F.3d at 1299 (Kleinfeld, J., dissenting).[15]

The *mens rea* requirements of RCRA and the CWA maintain the important distinction between the civil and criminal enforcement realms. Corporate officers are properly accountable for corporate wrongdoing in accordance with civil schemes where intent is not an element of the offense. They should also be criminally liable when they possess the *mens rea* specified by statute.

But imputing *mens rea* to an individual based on corporate position rather than personal action weakens the authority of the criminal law. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L.J. 2407, 2511 (1995) ("[V]iolations of federal environmental laws can involve the kind of morally culpable behavior warranting felony sanctions. The challenge is to define the sanctions in a manner more consistent with th[e] culpability touchstone."); Mark A. Cohen, *Environmental Crime and Punishment*, 82 J. Crim. L. & Criminology 1054, 1103 (1992) ("There is growing concern about . . . corporate officers held criminally liable for incidents that are not intentional or not controllable by the party being held liable. Although few would argue against strict liability for reasonable cleanup costs and third party damages, punitive sanctions . . . are another matter."); *Disappearing Distinction*, *supra*, at 217 (asserting the importance of punishing corporate environmental crime, but distinguishing between "knowing"

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[15] *See also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 220 (1991) (hereinafter *Disappearing Distinction*) (discussing the increasing criminalization of regulatory offenses and noting that "there is a social loss in defining the criminal law so that individuals cannot safely avoid its application").

violations and those unaccompanied by the *mens rea* necessary to justify criminal penalties).

The law professor who coined the phrase "public welfare offense," cautioned that "[t]he group of offenses punishable without proof of any criminal intent must be sharply limited." Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 70 (1933). If true culpability is not a prerequisite to liability for serious offenses, crime loses its moral stigma.[16] Thus, while the "responsible corporate officer" doctrine may be useful for allocating responsibility for strict liability regulatory offenses, applying it in felony cases risks over-criminalizing conduct in regulated fields.[17] It also

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[16] *See* Lazarus, *supra*, at 2442-43 ("[B]ecause moral stigma is one of a criminal conviction's essential features . . . careful definitions and procedural safeguards are critical to the viability of the sanction."); Cohen, *supra*, at 1104 ("[C]riminalization of regulatory behavior might trivialize the criminal law itself. If every action that harms society is a crime, the criminal law loses its one distinguishing characteristic—the moral stigma associated with being labeled a criminal."). The effectiveness of the criminal law is in turn undermined. *See Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting) (noting in the context of environmental crimes that "[d]ilution of the traditional requirement of a criminal state of mind . . . reduces the moral authority of our system of criminal law"); *Disappearing Distinction*, *supra*, at 193 (The "blurring of the border between tort and crime predictably will result in injustice, and ultimately will weaken the efficacy of the criminal law as an instrument of social control.").

[17] *See* Lazarus, *supra*, at 2449 (In the environmental realm, "[t]he only distinction between a civil and criminal violation is that criminal defendants act with a culpable state of mind."); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 1875, 1880 (1992) (Courts' growing acceptance of vicarious criminal liability shows that "[a]t the same time that courts have begun to apply the penalties of the criminal law to legal standards that evolved within the civil law, they have also shown an increasing tendency to abandon some of the most important limits on the criminal law."); *"Knowing" Environmental Crimes*, *supra*, at 1018-19 ("[I]f courts allow doctrines such as deliberate ignorance and the responsible corporate officer principle to dilute a knowledge requirement,

compromises the integrity and coherence of the criminal law, which derives much of its moral force from the crucial distinction between culpable and non-culpable states of mind. See *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting) ("It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who . . . has no evil intention or consciousness of wrongdoing."); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401, 423 (1958) ("In the tradition of Anglo-American law, guilt of crime is personal.").

Preserving the intent element for serious environmental crimes also wisely constrains prosecutorial over-reaching. Imputed intent relieves the government of its burden to prove *mens rea*. This unduly eases the prosecutor's task and encourages criminal prosecution even where true culpability is lacking. See Lazarus, *supra*, at 2487. While a vigorous environmental enforcement scheme is a matter of great public importance, the public interest is not served when prosecutors operate outside legislated bounds. See Hart, *supra*, at 423 ("[M]aximizing compliance with [the] law, rather than successful prosecution of violators, is the primary aim of any regulatory statute."). Compelling lower courts to give effect to the *mens rea* requirements enacted by Congress would protect against arbitrary and unprincipled criminal enforcement. It would not preclude criminal liability for intentional wrongdoing, or strict liability for regulatory violations.

III. "CORPORATE CONSPIRACY" CHARGES MAY NOT BE USED TO CIRCUMVENT THE HEIGHTENED *MENS REA* REQUIREMENTS OF THE UNDERLYING VIOLATIONS.

The lower courts' casual approach to *mens rea* was reflected in all aspects of the *Hansen* case. Specifically, the

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the result will be criminalization of conduct which is already subject to civil enforcement on a strict liability basis for noncompliance with statutory requirements.").

courts allowed the government to rely on the less demanding conspiracy standards in lieu of proving the requisite knowledge elements for the underlying statutes.[18] The conspiracy count was based in part on the underlying substantive offense of "knowing endangerment." See R1-10. In affirming the conspiracy conviction, the court of appeals did not assess whether Hansen himself had actual, prior knowledge of imminent harm. Rather, the court determined that "the substantive offenses were *foreseeable consequences*" of the alleged co-conspirators' conduct. 262 F.3d at 1247 (emphasis added). The conspiracy charge thus allowed the government to prove its case with a simple "foreseeability" test, instead of meeting the heightened *mens rea* standard for "knowing endangerment." This use of the conspiracy count is particularly troubling in light of the fact that the "responsible corporate officer" instruction was given for the substantive offenses charged against Hansen as an individual; proof of Hansen's actual knowledge of "endangerment" was not required at any point in the proceedings.

In addition to eliding the individual responsibility elements of the underlying offenses, the opinion below failed to identify a *mens rea* sufficient to sustain the conspiracy conviction itself. To be guilty of a conspiracy under 18 U.S.C. § 371, alleged co-conspirators must share an unlawful objective. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("[T]he essence of [conspiracy] is an agreement to commit an unlawful act."). Individuals who act in concert but do not harbor an illegal objective do not possess the necessary *mens rea* for criminal conspiracy. No such illegal objective is apparent from the court of appeals' opinion. The conduct that the court deemed a "criminal conspiracy" appeared to consist

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[18] *Cf.* Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405, 409 (1959) (referring to "the tactical advantage [the conspiracy charge] brings to the prosecutor. By charging 'conspiracy,' he can reach persons who might escape conviction if they were proceeded against separately.").

mainly of sharing "the common goal to operate the plant until a buyer could be found." *Hansen*, 262 F.3d at 1247.

Firms in regulated industries necessarily and routinely confront regulatory challenges. Thus, Congress drafted the "knowing endangerment" provision "in a way intended to assure to the extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter." H.R. Conf. Rep. No. 96-1444, at 37, *reprinted in* 1980 U.S.C.C.A.N. at 5036-37. The *Hansen* opinion may or may not cause corporate officers to eschew regulatory responsibilities, but it surely conflicts with the plain intent of Congress: Under the statutes at issue here, corporate officers making difficult environmental decisions must not be convicted of crimes in the absence of criminal intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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